guilty induced by hope of lighter punishment on the ground that he has been forced to incriminate himself would be preposterous. It is hard to justify, then, a different result when, under a statute such as that in the principal case, a defendant is allowed to throw himself wholly on the court's mercy having no certainty that he has thereby bettered himself. It would appear, then, that the natural construction of this statute should have been adopted.[8]

LIABILITY OF PUBLIC SERVICE COMPANY FOR SERVANTS' ASSAULTS AND INSULTS PROVOKED BY THE PLAINTIFF. — A late Georgia case holds that a passenger who, by abusive language, has provoked an assault by the motorman, cannot recover damages for the assault from the railway company. *Binder* v. *Georgia Ry. & Electric Co.*, 79 S. E. 216. The Georgia rule, as the court in the principal case assumes, seems to be that insulting words justify a private individual in assaulting the insulter.[1] The general rule is *contra;*[2] hence the exact problem of the principal case could hardly arise elsewhere.[3] The case, however, has an important bearing on the mooted general question of whether a justification which would excuse a private individual will justify a breach of public duty by the company. The problem resolves itself into whether the inconvenience and peril which might result to the traveling public, in case such a justification is allowed, is overbalanced by the necessity for encouraging self-protection and allowing retaliation for insult.

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[8] The Third Article of the Constitution provides that "The trial of all crimes except in cases of impeachment, shall be by jury," etc. (applying only to federal courts. Eilenbecker *v.* Plymouth County, *supra*). It has been argued that the mandatory words in this article necessitate jury trials in all criminal cases. But the Constitution is interpreted in the light of the common law at the date of its adoption. West *v.* Gammon, 98 Fed. 420. So since at common law an accused could be sentenced by the court on a plea of guilty, under the Constitution such a sentence will stand. Territory *v.* Miller, 4 Dak. 173, 29 N. W. 7; West *v.* Gammon, 98 Fed. 426.

[1] The doubt in this matter is whether § 103 of the Georgia Penal Code, which provides that opprobrious words may be found by the jury to justify an assault, applies to civil proceedings. It has been held that it does not. Berkner *v.* Dannenberg, 116 Ga. 954, 43 S. E. 463. But other cases seem to decide that it does. See Cross *v.* Carter, 100 Ga. 632, 633, 28 S. E. 390. And see dissenting opinion of Fish, J., in Berkner *v.* Dannenberg, *supra.*

[2] Rarden *v.* Maddox, 141 Ala. 806, 39 So. 95; Goucher *v.* Jamieson, 124 Mich. 21, 82 N. W. 663. Many cases are collected in 3 Cyc. 1077, note 5.

[3] In jurisdictions where insult is deemed not to justify an assault, it is almost universally held that the insulting plaintiff can recover from the railroad company for assault by its servant. Haman *v.* Omaha Ry. Co., 35 Neb. 74, 52 N. W. 830; Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879. Birmingham Ry. & Electric Co. *v.* Baird, 130 Ala. 334, 30 So. 456; Scott *v.* Central Park, etc. Ry. Co., 6 N. Y. Supp. 382, *contra*, is overruled by Weber *v.* Brooklyn, etc. R. Co., 62 N. Y. Supp. 1; and Harrison *v.* Fink, 42 Fed. 787, *contra*, is in the federal circuit court for the northern district of Georgia.

In this connection an interesting doctrine which for a time prevailed in Georgia should be noted. A line of cases denied the insulting plaintiff a recovery for the assault on the ground that he had "put the servant out of tune," and so could not hold the master when the servant "did not furnish the proper music," on the analogy that a servant who, by tampering with his master's appliances, makes them unfit for use, cannot recover if he is injured thereby. Peavy *v.* Georgia R. Co., 81 Ga. 485, 8 S. E. 70; City Electric Ry. Co. *v.* Shropshire, 101 Ga. 33, 28 S. E. 508. The only possible merit in the analogy is its picturesqueness, and the doctrine was repudiated in Mason *v.* Nashville, etc. Ry. Co., 135 Ga. 741, 70 S. E. 225.

A public service company is not liable if an employee in self-defense strikes a passenger.[4] The basic reasons for this rule are that the state's interests demand that every man shall be allowed to defend himself and that no one shall be compelled to sacrifice his self-respect by passively submitting to assault; and these considerations outweigh the possible harm to which the employee's exercise of self-defense might subject the traveling public. Now a public service company is liable if its servants insult a passenger,[5] though no action lies against a private individual for mere insult.[6] Public policy imposes upon public servants a duty to protect their patrons in every way.[7] This duty includes protection against insults by the company's servants as well as by other persons. When the insult is provoked by the passenger, the company, it is submitted, should still be liable. The convenience of the traveling public requires that the company's servants should not bandy vituperative epithets with every profane passenger. Such verbal quarrels would not only continually shock and annoy other passengers, but, by terminating in fights, would often imperil their safety.[8] True, passengers can never be wholly immune from such dangers; but this is no argument for increasing them by allowing the servants to return abuse for abuse.[9] It cannot be argued here, as in the self-defense case, that the state's interests make the answering of insult necessary. Those interests are not jeopardized if the employees of a public servant are required to refrain from profanity contests with disorderly patrons. Nor is there sufficient weight in the contention that the plaintiff's conduct should bar him. In the first place, the plaintiff in a sense is enforcing the public rights as well as his own.[10] Again, since he is under no legal duty to refrain from insult, he has at most violated only a moral duty which the law cannot recognize.[11] This conclusion is not unsupported by analogy. A female plaintiff has been allowed to recover from the company for indecent proposals made by a conductor, even though they were encouraged by her immodest language.[12] If the arguments herein advanced are sound, the result reached by the Georgia case is clearly erroneous. For if the company ought to be liable when the provoked servant merely insults a

[4] Moore *v.* Columbia & G. R. Co., 38 S. C. 1, 16 S. E. 781; Hayes *v.* St. Louis R. Co., 15 Mo. App. 583. See Baltimore & O. R. Co. *v.* Barger, 80 Md. 23, 30, 30 Atl. 560, 561; New Orleans & Northeastern R. Co. *v.* Jopes, 142 U. S. 18, 25.

[5] Knoxville Traction Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557.

[6] Unless, of course, it is libellous or slanderous, and is published.

[7] Otherwise, equal service to all would be impossible. See Dunn *v.* Western Union Tel. Co., 2 Ga. App. 845, 850, 59 S. E. 189, 191.

[8] See Gallena *v.* Hot Springs R. Co., 13 Fed. 116, 122. The conductor's position makes it fair to say that somewhat more is expected of him than of the ordinary man.

[9] It should be remembered, too, that the conductor has a right, and a duty, to eject obnoxious passengers. Ejecting the profane passenger is certainly a better solution of the matter than returning his profanity.

[10] An interesting analogy is found in cases holding that a servant cannot assume the risks of his master's failure to perform a statutory duty, for which failure the master is criminally liable. Here, too, the plaintiff, in suing, is upholding the public interests as well as his own. See 26 HARV. L. REV. 262. Since in cases like the principal case there is no criminal liability, such enforcement is very necessary.

[11] The duty here is merely the duty, which in morals every man has, to conduct himself with decency. As such, it cannot be recognized by the law any more than the moral duty of a man to provide for his brother, to feed the starving, etc.

[12] Strother *v.* Aberdeen & A. R. Co., 123 N. C. 197, 31 S. E. 386.

passenger, *a fortiori* ought it to be liable when he assaults a passenger, even though he may[13] be under no individual liability in either case.

There remains the question whether the plaintiff's conduct in provoking the insult should be considered in mitigation of compensatory damages. The courts are divided where an insult by the plaintiff provokes the assault by the servant of the defendant company.[14] On the one hand, it is urged that the plaintiff, having brought the injury upon himself, should not recover full damages therefor; on the other, that to allow such mitigation may in effect make provocation a justification, since it enables the jury to give only nominal damages. Regardless of whether or not mitigation should be allowed in actions between individuals,[15] the true view seems to be that the vital interest of the public forbids its application in suits against public service companies.[16]

RECENT CASES.

ADVERSE POSSESSION — SUBJECT MATTER AND EXTENT OF ADVERSE POSSESSION — MINERALS: SEVERANCE FROM SURFACE BY DEED: GRANTEE OF ADVERSE POSSESSOR HOLDING POSSESSION FOR HIS GRANTOR. — The plaintiff's grantor took possession of certain land without any paper title and held it adversely for seven years. He then conveyed the surface of the land to X., reserving the minerals; and X. and his grantees entering held possession of the surface for the remainder of the statutory period, no one meanwhile operating the mines. Thereafter the plaintiff bought the minerals from the grantor, and brings this bill to quiet his title to them. *Held*, that the plaintiff is entitled to the relief sought. *Moore* v. *Empire Land Co.*, 61 So. 940 (Ala).

The court decides that while the conveyance of the surface reserving the minerals actually worked a severance of the mineral and surface rights as between grantor and grantee, nevertheless as regards all outsiders the possession of the surface by the grantee is also a possession of the minerals. This possession of the minerals, however, the grantee holds for his grantor, and at the end of the statutory period the grantor, though not in actual possession himself, has obtained a good title to the mineral rights by adverse possession. Hence on this reasoning it follows that a purchaser from him should be permitted to quiet title to the minerals. In a similar Alabama case it was held conversely that adverse possession of the surface by a grantor was also a possession of the minerals for the benefit of his grantee of the minerals. *Black Warrior Coal Co.* v. *West*, 170 Ala. 346, 54 So. 200, see 24 HARV. L. REV. 582, for an editorial comment on this case.

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[13] The word "may" is used advisedly. It is possible that in time the employees of a public service company will themselves be regarded as public servants. This doctrine, however, is yet in its incipiency.

[14] That it should — Houston, etc. R. Co. *v.* Batchler, 32 Tex. Civ. App. 14, 73 S. W. 981; that it should not — Mahoning Valley Ry. Co. *v.* De Pascale, 70 Ohio St. 179, 71 N. W. 633. That it should mitigate exemplary damages, all courts agree. This is satisfactory, since the awarding of such damages against a corporation whose proper officers have not ordered the acts complained of, is anomalous, in that it punishes a personally innocent defendant. See SEDGWICK, DAMAGES, 9 ed., § 380.

[15] The general rule seems to allow mitigation if the insult is recent. Daniel *v.* Giles, 108 Tenn. 242, 66 S. W. 1128. See Le Laurin *v.* Murray, 75 Ark. 232, 238, 87 S. W. 131, 133. *Contra*, Goldsmith's Adm'r *v.* Joy, 61 Vt. 488, 17 Atl. 1010.

[16] The analogy referred to in note 10, *supra*, is applicable here also.